188 (2)

No. 10-1256

In the
Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

BRIEF IN OPPOSITION

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May 16, 2011

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QUESTION PRESENTED

Are constitutionally protected due process rights violated by the California Mediation Confidentiality Law, Cal. Evid. Code §§ 1119, 1123, when enforcing a settlement agreement against a participating party even though there is no judicial or other state action taken involving the statutes in question?

CORPORATE DISCLOSURE STATEMENT

Kathleen M. Lund and Craig T. Lund; individually and as Co-Trustees of the Lund Family Trust are not a subsidiary or affiliates of a publically owned company.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF REASONS TO DENY THE PETITION 1

PETITIONER HAS MISREPRESENTED THE FACTS OF THIS MATTER 1

A. Lack of Warning 2

B. Lack of Waiver 2

CONCLUSION 3

APPENDIX

Appendix A: Declaration of Craig T. Lund (May 9, 2011) 1b

TABLE OF AUTHORITIES

Statute

Cal. Evid. Code §§ 1119, 1123 i

Rule

Sup. Ct. R. 15.2 1

SUMMARY OF REASONS TO DENY THE PETITION

The Brief in Opposition to the Petition for a Writ of Certiorari to be submitted by Co-Respondent, Norma Tree Service has been carefully reviewed and Co-Respondents Craig and Kathleen Lund adamantly agree with the substance and analysis of these legal matters as presented therein. Providing a separate brief on the same issues and arguments would only abrogate judicial economy. Therefore, Respondents Craig and Kathleen Lund adopt and incorporate by reference the entire brief in opposition submitted by Co-Respondents Norma Tree Service and Norma Gonzales.

PETITIONER HAS MISREPRESENTED THE FACTS OF THIS MATTER

While Co-Respondents, Craig and Kathleen Lund rely upon the sound logic and legal arguments presented in Co-Respondents Norma Tree Service's Brief in Opposition, Co-Respondents Craig and Kathleen Lund are required to address the warning contained in Supreme Court Rule 15.2. Said rule provides that if any perceived misstatements of fact or law in the Petition are not addressed, they may later be deemed to have been waived. Co-Respondent Lund believes that the court analysis should never get to these issues based upon the reasoning and legal analysis presented in Co-Respondent Norma Tree Service's Brief in Opposition. But, in an abundance of caution, these perceived misrepresentations must be identified.

A. Lack of Warning

Petitioner has created for the first time an argument that somehow there were inadequate warnings as to the potential outcomes when Petitioner chose to mediate rather than elect any of the other available services such as a judicial settlement conference. The inference presented by Petitioner is that there were no warnings actually articulated to Petitioner as to the consequence of triggering the California Confidentiality Statutes when voluntarily choosing mediation. Based upon this being the first time this particular issue is raised by Petitioner and based upon its misrepresentation, Co-Respondent Lund submits the attached Declaration of Craig Lund and the authenticated "Acknowledgment Regarding California Evidence Code" signed by all parties including Petitioner Chan on October 30, 2007. The date that this document was signed was the first mediation session involving Mediator Kelly. The final settlement document was executed on August 4, 2008, which was the fifth mediation session held with Mediator Kelly in this matter. Resp. App. at 1b; Pet. at 4.

B. Lack of Waiver

Another issue manufactured by Petitioner for the first time in his Petition is the allegation that there could not have been a waiver of Chan's due process rights as they pertain to the potential, but not actual, impact of the California Confidentiality Statutes. Pet. at 21. Petitioner further argues that the "Court will not presume acquiesces in the loss of a fundamental constitutional right." Pet. at 22. Again, this is an attempt to misrepresent the facts of this case when

there was actually a signed Acknowledgment which specifically addresses the application of the California Confidentiality Statutes and Petitioner fails to disclose in his brief. App. at 1b.

CONCLUSION

With brevity, and lack of redundancy still at a premium, Petitioner has failed on numerous grounds to establish any legitimate reason for his Petition to be granted by this Court. It is the respectful request by all Respondents that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Declaration of Craig T. Lund (May 9, 2011) 1b

APPENDIX A

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 10-1256

[Dated May 9, 2011]

BILL CHAN,	)
	)
Petitioner,	)
	)
vs.	)
	)
KATHLEEN MARIE LUND and CRAIG T. LUND, Individually and as Co-Trustee of LUND FAMILY TRUST and DOES 1-20,	)
	)
Respondent.	)
	)

DECLARATION OF CRAIG T. LUND

I, CRAIG T. LUND hereby declare:

1. I am an adult over eighteen years of age, reside in the State of California, have personal knowledge of the things and matters hereinafter set forth, and if called as a witness can testify competently thereto.

2. I was a named defendant in the Santa Clara County Superior Court Case No. 1-06-CV-072392.

3. As part of the voluntary mediation in the matter (1-06-CV-07239, I and my wife, co-defendant, Kathleen Lund signed an "Acknowledgment Regarding California Evidence Code" on October 30, 2007. A true and correct copy of that document is attached as Exhibit A to this declaration.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 9th day of May, 2011 at San Jose, California.

CRAIG T. LUND

ACKNOWLEDGEMENT REGARDING CALIFORNIA EVIDENCE CODE

In the Matter of Mediation between

Re: Chan v. Lund

In order to promote communication among the parties and the mediator and to facilitate resolution of the dispute, all undersigned participants agree as follows:

1. This mediation process is to be considered settlement negotiations for the purpose of all state and federal rules protecting disclosures made during such process from later discovery and/or use in evidence.

2. The provisions of California Evidence Code Sections 1115 through 1128 and 703.5, apply to this mediation. The substance of the significant portions of these sections is described below. This agreement extends to all present and future civil, judicial, quasi-judicial, arbitral, administrative or other non-criminal proceedings.

3. The privileged character of any information or documents is not altered by disclosure to the mediator. The mediator's subsequent oral and written communications with the mediation participants in a continuing effort to resolve the dispute are also protected by this Agreement. In the event the mediation does not fully resolve the dispute in the initial session, the participants agree that the confidentiality provisions of Sections 1115 through 1128 and of this Agreement continue in full force and

effect past the 10 calendar day period set forth in Evidence Code Section 1125(a) (5), unless the mediation is terminated through any of the mechanisms set forth in section 1125 (a) (3) and (4) or (b) (1) and (2).

4. This Agreement and any written settlement agreement resulting from the mediation are admissible to prove the existence of and/or to enforce the settlement agreement under California Code of Civil Procedure Section 664.6, if applicable, or under any procedure permitted by law.

5. Because the participants are disclosing information in reliance upon this Agreement, any breach of this Agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such privileged information in violation of this Agreement.

6. THE PARTICIPANTS UNDERSTAND THAT THE MEDIATOR IS SERVING AS A NEUTRAL INTERMEDIARY AND FACILITATOR OF SETTLEMENT ONLY AND THAT HE OR SHE IS PROHIBITED FROM ACTING AS AN ADVOCATE OR ATTORNEY FOR EITHER PARTY. THE MEDIATOR'S STATEMENTS DO NOT CONSTITUTE LEGAL ADVICE TO ANY PARTY, AND EACH PARTY IS ENCOURAGED TO SEEK LEGAL ADVICE FROM COUNSEL. IN

THE EVENT THAT THE MEDIATOR ASSISTS IN THE PREPARATION OF A SETTLEMENT AGREEMENT, EACH PARTICIPANT IS ADVISED TO HAVE THE AGREEMENT INDEPENDENTLY REVIEWED BY COUNSEL PRIOR TO EXECUTING THE AGREEMENT.

David R. Rickard Atty (Name and Title)	David R. Rickard 10/30/07 (Signature and Date)
BILL CHAN (Name and Title)	Bill Chan 10/30/07 (Signature and Date)
RAY MORNEAU, ARBORIST (Name and Title)	Ray Morneau 10/31/2007 (Signature and Date)
Kathleen Lund (Name and Title)	Kathleen Lund (Signature and Date)
CHRIS LUND (Name and Title)	10/30/07 (Signature and Date)
Sal Suasci, Atty (Name and Title)	10/30/07 (Signature and Date)
Kenneth D. Simonini (Name and Title)	10-30-07 (Signature and Date)
Kevin G. Kelly (Name and Title)	Kevin G. Kelly 10/30/07 (Signature and Date)

(NCP/arw)